Supreme Court, U.S.
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No. 91-1930

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

Daniel Vasquez, Warden, and Daniel E. Lungren, Attorney General of the State of California, Petitioner

vs.

Robert J. Thompson, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, Robert J. Thompson, asks leave to file the accompanying response to petition for writ of certiorari, without prepayment of costs and to proceed in forma pauperis. Respondent has been granted leave to so proceed before the California Supreme Court. Respondent's affidavit in support of this motion is attached hereto.

Dated: October 23, 1992

Respectfully submitted,

Norma W. Mitchell

NORMA W. MITCHELL
Counsel for Respondent

28 pp

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Daniel Vasquez, Warden, and Daniel E. Lungren, Attorney General of the State of California, Petitioner

vs.

Robert J. Thompson, Respondent

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Robert J. Thompson, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore, and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true:

1. Are you presently employed? Yes_____ No_____

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

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b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

1981

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes ✓ No ____

a. if the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

gift from parents

3. Do you own any cash or checking or savings account (include any funds in prison accounts)? Yes ✓ No ____

a. If the answer is yes, state the total value of the items owned.

$264.74

4. Do you own any real estate, stocks, bonds, notes automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ____ No ✓

a. If the answer is yes, describe the property and state its approximate value.

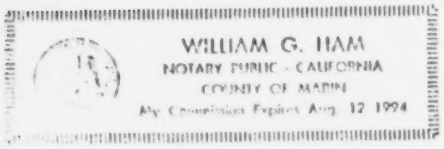
5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Robert J. Thompson
ROBERT J. THOMPSON

SUBSCRIBED AND SWORN TO before me this 11 day of September, 1992.



William G Ham
NOTARY PUBLIC

CERTIFICATE

I hereby certify that the respondent Robert J. Thompson has the sum of $264.74 on account to his credit at San Quentin where he is confined. I further certify that respondent likewise has the following securities to his credit according to the records of said institution:

N/A B

Dated: 9-11-92

William G Ham ca tt
Authorized Officer of San Quentin State Prison

No. 91-1930

IN THE
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DANIEL VASQUEZ, Warden, and DANIEL E. LUNGREN, Attorney General of the State of California,
Petitioner,

v.

ROBERT J. THOMPSON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does a United States District Court have jurisdiction under the All Writs Act (28 U.S.C. § 1651(a)) and/or under 28 U.S.C. § 2251 to temporarily stay the execution of a state prisoner who is entitled to the appointment of counsel in federal habeas corpus proceedings pursuant to 18 U.S.C. § 3006 A(a)(2)(B) and 21 U.S.C. § 848(q)(4)(b) and who has filed an application for the appointment of counsel to assist him in preparing and filing his first federal habeas corpus petition?

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v.

ROBERT J. THOMPSON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Robert J. Thompson (Thompson), hereby responds to the Petition for Writ of Certiorari (the Petition) filed by petitioners Daniel Vasquez, Warden, State Prison at San Quentin, California, and Daniel E. Lungren, Attorney General of the State of California (the State), seeking review of the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, issued March 12, 1992, an unpublished memorandum opinion.

ADDITIONAL STATUTORY AND LOCAL RULES INVOLVED

28 U.S.C. § 1651(a), The All Writs Act, provides: "The Supreme Court and all courts established by act of congress may issue all writs necessary or appropriate in aid of their

respective jurisdictions and agreeable to the usages and principles of law."

Local Civil Rule 26.8.7(c) of the United States District Court for the Central District of California states: "Temporary stay for Preparation of the Petition: Where counsel new to the case is appointed, upon counsel's application for temporary stay of execution accompanied by a specification of nonfrivolous issues to be raised in the petition, the district court shall issue a temporary stay of execution unless no nonfrivolous issues are presented. The temporary stay will remain in effect for one hundred twenty (120) days to allow newly appointed counsel to prepare and file the petition. The temporary stay may be extended by the court upon a subsequent showing of good cause."

Local Civil Rule 26.8.4(a)(iv) of the United States District Court for the Central District of California states: "If state appellate counsel is not available to represent petitioner on federal habeas corpus or if appointment of state appellate counsel would be inappropriate for any reason, the court shall appoint counsel upon application of petitioner. The Clerk of Court shall have available forms for such application. Counsel shall be appointed from the panel of qualified attorneys certified by the selection board. Either California Appellate Project or the selection board may suggest one or more counsel for appointment. The court may also request suggestion of one or more counsel from California Appellate Project or the selection

board. If application for appointed counsel is made before a petition has been filed, the application shall be assigned to a district judge. The judge so assigned shall be the judge assigned when counsel files a petition for writ of habeas corpus."

California Penal Code section 1227 states: "If for any reason other than the pendency of an appeal pursuant to subdivision (b) of Section 1239 of this code a judgment of death has not been executed, and it remains in force, the court in which the conviction was had shall, on application of the district attorney, or may upon its own motion, make and cause to be entered an order appointing a day upon which the judgment shall be executed, which must not be less than 30 days nor more than 60 days from the time of making such order; and immediately thereafter, a certified copy of such order, attested by the clerk, under the seal of the court, shall, for the purpose of execution, be transmitted by registered mail to the warden of the state prison having the custody of the defendant; provided, that if the defendant be at large, a warrant for his apprehension may be issued, and upon being apprehended, he shall be brought before the court, whereupon the court shall make an order directing the warden of the state prison to whom the sheriff is instructed to deliver the defendant to execute the judgment at a specified time, which shall not be less than 30 days nor more than 60 days from the time of making such order.

"From an order fixing the time for and directing the execution of such judgment as herein provided, there shall be no appeal."

STATEMENT OF THE CASE

Respondent Thompson was convicted of first-degree murder under special circumstances in California state court and was sentenced to death. The conviction and sentence were affirmed on appeal. People v. Thompson 50 Cal. 3d 134, 785 P.2d 857, (1990), cert. denied, 111 S. Ct. 226 (1990).

On October 30, 1990, the Orange County Superior Court filed a Warrant of Execution ordering Respondent to be put to death at San Quentin prison on December 28, 1990.

On December 5, 1990, acting pro se, Thompson filed a "Request for Appointment of Counsel in Death Sentence Case and for Stay of Execution of Death Sentence." Thompson's request for stay was accompanied by his declaration stating "I intend to file a petition for writ of habeas corpus in this court, alleging federal constitutional errors which entitle me to relief from the judgment of death." Thompson also stated that he was under imminent sentence of death; that the attorney who represented him in state court was unavailable to represent him in his federal habeas proceeding; that he was indigent and requested the appointment of an attorney to represent him "in death penalty habeas corpus litigation" in the federal courts.

Because the selection board of the Central District of California, California Appellate Project, had difficulty securing

qualified counsel, two extensions of the stay order were requested pursuant to Central District Rule 26.8.4(a)(iv). These requests were granted by the district court, extending the stay order to March 21, 1991.

Shortly thereafter, the petitioner moved to vacate the stay of execution and, in the alternative, objected to any further stays. In this motion, petitioner contended that the district court lacked jurisdiction to issue a stay because no petition for writ of habeas corpus had been filed.

On March 21, 1991, the court appointed counsel to represent Thompson. That counsel, in conformity with Local Rule 26.8.7(c), filed Thompson's specification of nonfrivolous issues and also applied for a 120-day stay. On the same date, the 120-day stay was granted "to permit the preparation of a habeas corpus petition by petitioner's newly appointed counsel." Order Staying Execution of 03/21/91, at 1.

On March 28, 1991, the district court filed its opinion denying petitioner's motion to vacate the stay. Petitioner appealed to the Ninth Circuit, which heard the matter on March 6, 1992. On March 12, 1992, the Ninth Circuit affirmed the district court judgment.

ARGUMENT

THE UNITED STATES DISTRICT COURT CORRECTLY EXERCISED ITS JURISDICTION PURSUANT TO STATUTORY AUTHORITY AND LOCAL COURT RULES TO TEMPORARILY STAY THE EXECUTION OF A CONDEMNED PRISONER WHO HAD REQUESTED THE ASSISTANCE OF COUNSEL TO WHICH HE WAS ENTITLED IN PREPARING HIS FIRST FEDERAL HABEAS CORPUS PETITION

INTRODUCTION

The narrow issue appealed to and decided by the court of appeals in this case and Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991), was whether an indigent death-sentenced prisoner's filing of an application for the appointment of counsel to assist him in preparing his first federal habeas corpus petition constituted an invocation of habeas corpus proceedings conferring jurisdiction on the district court to issue a temporary stay of execution. By contrast, petitioner seeks review of broader issues that were not before the court of appeals -- nor susceptible of informed resolution on the current record -- regarding the district court's exercise of discretion to permit counsel the time reasonably necessary to prepare a finished petition.

Petitioner's discussion of the issue presented does not accurately describe the significant facts and procedural history that justified the lower courts' rulings, the provisions of the local rules under which the district court issued a stay of execution, nor the legal basis for the court of appeals' holding. When these factors are correctly understood, it is evident that the rulings of the district court and the Ninth Circuit are wholly consistent with settled law governing the exercise of

habeas corpus jurisdiction and vindicate Congress's intent to provide counsel to indigent prisoners in federal capital habeas corpus proceedings. In addition, petitioner has failed to demonstrate that any of the traditional bases for invoking this court's limited resources -- to resolve a conflict among the circuits and to resolve an issue of national importance -- is present here. Nor could petitioner. The order from which petitioner appealed and the local rules that guided the issuance of the order do not conflict with any authority.

I

THE PROCEDURAL POSTURE OF THIS CASE DOES NOT IMPLICATE THE ISSUES RESPONDENT ASSERTS AS JUSTIFYING A GRANT OF CERTIORARI

As framed by petitioner, the question presented is whether the district court may stay execution of a state death judgment when the prisoner "has never filed a petition for writ of habeas corpus or anything that could reasonably be construed as a petition." Petition at i (emphasis added). The order from which petitioner appealed to the Ninth Circuit imposed only a temporary stay of execution to appoint counsel. Yet, petitioner's discussion of the consequences that warrant a grant of certiorari -- i.e., additional stays to permit appointed counsel a reasonable opportunity to prepare the petition -- concern events that may occur under the local rules only if newly appointed counsel files a formal specification of nonfrivolous claims in support of a request for additional time to prepare the

petition. C.D. Cal. Local Rule 26.8.7(c).[1] Contrary to petitioner's suggestion, petitioner did not raise, and the court of appeals did not decide, whether filing a formal specification of constitutional violations constituted the functional equivalent of filing a petition "seeking relief" under section 2254. See Petition at 38. Equally important, petitioner has never explained to the district court why counsel's specification of issues is insufficient to invoke the district court's habeas corpus jurisdiction, or what else the district court should have required -- such as having the prisoner sign the specification of issues -- in order to consider the document the functional equivalent of a petition.

Although cast as an attack on the district court's authority to stay an execution to appoint counsel, petitioner's real complaint is with the amount of time the district court reasonably may give appointed counsel to complete his or her work. Because petitioner did not raise this issue below, it did not give the district court or respondent an opportunity to correct what petitioner itself may regard as merely technical objections to the district court's exercise of jurisdiction.[2]

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[1] Indeed, petitioner does not explain whether any of the cases listed in Appendix D is one in which counsel had yet to be appointed at the time the petition for writ of certiorari was filed. The purportedly significant dates provided by petitioner are those only for the initial stay and the date the habeas petition, if filed, was filed.

[2] Petitioner has no objection to the district court exercising habeas corpus jurisdiction if the prisoner signs a preprinted federal habeas corpus form supplemented by a photocopy of "the table of contents" of the state court pleadings.

Clearly, such technical objections still can be resolved and easily rendered moot if petitioner presents them to the district court. Thus, even under petitioner's view, any remaining questions regarding the exercise of the district court's discretion to permit counsel to amend the petition then would be unlikely to raise issues worthy of a grant of certiorari.

In any event, because the Ninth Circuit affirmed only the district court's authority to temporarily stay respondent's execution to permit the appointment of counsel, the question of what additional pleadings were necessary to permit counsel a reasonable opportunity to prepare a final petition cannot properly be raised at this juncture.

II

THE ALL WRITS ACT PROVIDED THE AUTHORITY FOR THE DISTRICT COURT, PURSUANT TO THE LOCAL RULES, TO PRESERVE ITS JURISDICTION IN RESPONDENT'S CASE

By overlooking the provisions of Local Rule 26.8.7(c) petitioner also overstates the issue by suggesting that the Local Rules of the Central District of California authorize the

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Petition at 35-36. "[S]uch a proper petition" would permit the district court to both appoint counsel and permit counsel the opportunity to "more fully present" the prisoner's claims. Id. at 36. The substance of such a document, however, would unquestionably be of less value than the specification of issues, prepared by counsel, in enabling the district court to determine whether there are potentially colorable grounds for relief. The only other difference between the two documents is that the type favored by petitioner is signed by the prisoner and the one contemplated by the local rules is signed by counsel. Presumably, petitioner thus would have had no objection to the district court continuing to exercise habeas corpus jurisdiction if respondent also signed the document prepared by appointed counsel. This is not a difference that warrants a grant of certiorari.

district court to issue a temporary stay of execution when any state prisoner sentenced to death applies for the appointment of counsel and that the rules raise the prospect of "hundreds of stay orders" being issued "in the total absence of any colorable showing of a constitutional violation . . . ." Petition at 20-21 (emphasis added). The suggestions are meritless, and an examination of the Rules' provisions demonstrate that they contemplate an appropriate exercise of the district court's jurisdiction under the All Writs Act. See 28 U.S.C. § 1651(a).

Local Rule 26.8.7 provides for a temporary stay only in those cases in which the attorney who represented a death-sentenced prisoner in state court is unavailable to go forward in federal habeas corpus proceedings. In those cases in which the prisoner seeks federal court appointment of the same attorney who represented him in state proceedings, the local rules provide for issuance of a stay of execution only upon the filing of the habeas corpus petition. Local Rule 26.8.7(a). Thus, the provisions of the Local Rule providing for a "new counsel" stay are invoked only when it is necessary to prevent the prisoner from being executed before the district court can find counsel to represent him.

Similarly, as discussed above -- and contrary to petitioner's suggestion -- once new counsel is appointed, any further stay to allow counsel to become familiar with the record and prepare a habeas petition requires that counsel first file a specification of nonfrivolous issues to be raised in the

petition. Local Rule 26.8.7(c). The district court is thereby assured that the existence of potentially meritorious habeas corpus claims justify counsel's request to become familiar with the state court record.[3] At the very least, there can be no rational fear that the district courts will grant temporary stays "in the total absence of any colorable showing" of constitutional violations.

In a jurisdiction such as California where state court records may exceed 40,000 pages of transcripts, see, e.g., People v. Price, 1 Cal. 4th 324, 376 n.1 (1991), and the prisoner may be executed within 30 to 60 days of a noticed hearing to set an execution date, California Penal Code § 1227, a stay to permit new counsel to review the record is essential to affording a prisoner the assistance of counsel in preparing a first habeas corpus petition.[4]

The information provided to the district court by way of the application for counsel and the specification of issues

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[3] The necessity to specify such claims also rebuts petitioner's suggestion that absent a petition "there is no way for a district court to ascertain if any of the potential, but as yet unraised, claims have been exhausted in state courts." Petition at 30-31 (emphasis added).

[4] Such stays also are crucial to the district court's ability to appoint qualified counsel, particularly in light of the Court's announcement of the abuse of the writ doctrine in McCleskey v. Zant, 111 S. Ct. 1454 (1991). McCleskey requires a prisoner to assert all available constitutional claims in his initial habeas corpus petition or risk losing potentially viable claims. Qualified attorneys are unlikely to accept the awesome responsibility of federal habeas corpus representation if they are not given the time necessary to prepare a petition raising all reasonably available claims.

provides the court at either juncture with justification for exercising its authority under the All Writs Act to preserve its future jurisdiction. The All Writs Act invests a federal court with the power . . . to issue injunctive orders in a case even before the court's jurisdiction has been established. When potential jurisdiction exists, a federal court may issue status quo orders to insure that once its jurisdiction is shown to exist, the court will be in a position to exercise it." I.T.T. Community Dev. Corp. v. Barton, 569 F.2d 1351, 1359 n.19 (5th Cir. 1978) (citing FTC v. Dean Foods Co., 384 U.S. 597, 603-05 (1966) [on application of federal regulatory agency, appellate court's power to enter a status quo injunction "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may later be perfected." 384 U.S. at 603 (emphasis added)]). This Court's well established case law regarding the scope of the All Writs Act recognizes that "[p]rocedural instruments are means for achieving the rational ends of law . . . . Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound discretion to achieve the ends of justice entrusted to it." Adams v. United States ex rel. McCann, 317 U.S. 269, 272-73 (1942).

This jurisdiction-preserving power consistently has been invoked to stay the execution of state prisoners who may be eligible for federal relief, regardless of whether they have

filed a formal petition or validly invoked the court's jurisdiction to provide final relief. See, e.g., Edwards v. New York, 76 S. Ct. 538 (1956) (Harlan, J., in chambers) (despite "grave doubts, to say the least" as to the presence of a substantial federal question, "this being a capital case I am constrained to give petitioner a reasonable opportunity to petition for a writ of certiorari"); United States v. Shipp, 203 U.S. 563, 573 (1906) (Holmes, J.) (even had federal habeas jurisdiction been absent, federal stay of execution was proper, as was contempt prosecution arising from lynching of habeas petitioner during stay; stay was necessary for federal court to determine its own jurisdiction over action). Indeed, the Attorney General of California invoked a form of this jurisdiction-preserving power in California v. Velasquez, 445 U.S. 1301 (1980) (Rehnquist, J., in chambers), obtaining a stay of proceedings before filing a petition for certiorari -- following the California Supreme Court's reversal of the respondent's sentence of death.

In FTC v. Dean Foods Co., 384 U.S. 597 (1965), this Court made unmistakably clear that a federal court may act under the All Writs Act to preserve its future federal jurisdiction over a matter committed to it by statute. In Dean Foods, the court of appeals enjoined a company's merger and dissolution to preserve the court's future jurisdiction under the Administrative Procedures Act. Pursuant to the Administrative Procedure Act, the court of appeals has original jurisdiction to review final

orders of federal administrative agencies. Although this regulatory matter was still pending before an administrative agency, and no federal court action had been formally initiated, the court of appeals was nevertheless permitted, under the All Writs Act, to stay the dissolution of the company pending invocation of the court's jurisdiction under the Administrative Procedures Act. Dean Foods, 384 U.S. at 603-05.

The All Writs Act is particularly appropriate here. Respondent's death would literally terminate the court's subject matter jurisdiction. Application of President and Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir. 1964). Respondent's death is, of course, petitioner's goal. In Application of President, the judge, pursuant to the All Writs Act, issued an order permitting nonconsensual blood transfusions; "[b]ecause of the demonstrated imminence of death from loss of blood, signing the order was necessary to maintain the status quo and prevent the issue respecting the rights of the parties . . . from becoming moot before full consideration was possible." Id. at 1007. Recognizing that federal jurisdiction does not depend on a comprehensive initial pleading, the court explicitly noted and excused defects in the form of the papers filed. Id. at 1001 n.2.

Accordingly, when an unrepresented prisoner facing execution seeks the assistance of counsel to which he is statutorily entitled in order to prepare his first habeas corpus petition, the All Writs Act empowers the district court to

temporarily stay the prisoner's execution to appoint counsel. When, as contemplated by the local rules, appointed counsel then apprises the court of the existence of potential, colorable claims for relief, the court also is authorized to stay the prisoner's execution at least for the time reasonably necessary to permit counsel to render the assistance he or she was appointed to render. A contrary result would preempt the prisoner's right to federal court consideration of important constitutional claims and frustrate the will of Congress in providing a statutory right to counsel in such cases.

III

THE DECISION OF THE COURT OF APPEALS IS BASED ON A NARROW READING OF APPLICABLE STATUTES AND DOES NOT PRESENT THE BROAD ISSUE RAISED BY PETITIONER

Even if petitioner had limited its petition to the issue actually considered by the Ninth Circuit, petitioner has overstated the basis for the circuit's decision in Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991). Petitioner describes Brown as holding:

> [A] federal district court has the inherent power to stay the execution of a state death sentence even though the prisoner has not filed a petition for habeas corpus but has only filed a request for counsel.

Petition at 17 (emphasis added). Because no such "inherent power" exists, petitioner argues, this "Court should grant certiorari to instruct the lower federal courts on the limits of their jurisdiction to grant a stay of execution . . . ." Id. at 18. A plain reading of Brown, however, reveals the decision to be firmly based on the federal courts' statutory power that is

conferred pursuant to 28 U.S.C. § 2251 to a district court judge "before whom a habeas corpus proceeding is pending . . . ." Brown v. Vasquez, 952 F.2d at 1169.

As construed by the Brown court, a "proceeding is pending" within the meaning of section 2251 once a condemned prisoner files his application for the appointment of counsel to assist with the preparation of a habeas corpus petition. The Brown court reasoned that the purpose for appointing counsel in habeas corpus was to assist both the court and the petitioner by insuring that the finished petition complied with the often complex requirements of habeas corpus jurisprudence. Brown concluded that the district court's statutory power to appoint counsel to represent a habeas petitioner,[5] includes the authority to "issue a stay of execution when necessary to make the appointment and to allow appointed counsel reasonable time to do his job." Id. at 1169. A contrary interpretation of the statute would risk the "perverse absurdity" of permitting the prisoner to be executed "before the appointed counsel could be found or before that counsel could undertake the task for which he was appointed." Id.

Thus, contrary to petitioner's suggestion, neither the district court nor the court of appeals has attempted to arrogate onto themselves jurisdiction that was not otherwise conferred by

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[5] Indeed, 21 U.S.C. section 848, subdivision (q)(4)(b) mandates the appointment of counsel in death penalty habeas corpus cases.

Congress. Accordingly, a grant of certiorari is unnecessary to "instruct" either court as to the limits of its jurisdiction.[6]

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[6] Moreover, the court of appeals's statutory interpretation -- that the application for appointment of counsel is an integral part of the habeas process sufficient to initiate "proceedings" under section 2251 -- creates no issue worthy of granting certiorari. Petitioner has pointed to no conflicting authority. Demosthenes v. Baal, 495 U.S. 731 (1990) is a standing case, not a jurisdiction case. The only holding in Demosthenes is that those who sought to assert the rights of the petitioner in that case did not have standing to do so. In re Blodgett, 112 S. Ct. 674 (1992) has nothing to do with the question of jurisdiction raised here. In Blodgett, the Court denied a petition for writ of mandamus directing the court of appeals to issue its decision on a two-year old appeal from the denial of a second federal habeas corpus petition. Id. at 675. Blodgett stands for the proposition that a court of appeals has a duty to, without delay, consider claims raised in appeals from denial of successive habeas petitions. Id. at 676. In marked contrast, this case does not involve successive petitions. The other cases petitioners cites in "support" of its argument are habeas proceedings wherein the question raised in Brown and the instant case did not arise since petitions had been filed. See Smith v. Armontrout, 825 F.2d 182 (8th Cir. 1987); Reese v. Teets, 248 F.2d 147 (9th Cir. 1957); Modesto v. Nelson, 296 F. Supp. 1375 (N.D. Cal. 1969); Moorer v. State of South Carolina, 240 F. Supp. 529 (E.D.S.C. 1964); United States ex rel. La Marca v. Denno, 159 F. Supp. 486 (S.D.N.Y. 1958). None of the cases cited by petitioner required the filing of a habeas petition for the exercise of jurisdiction, and all are in harmony with the holding in Brown and the instant case.

Similarly, even if the application for appointment of counsel is not sufficient to create a habeas corpus "proceeding," it is clearly adequate, as discussed above, to apprise the district court of its potential jurisdiction in the matter and justify issuance of an injunctive order under the All Writs Act to preserve such jurisdiction. See FTC v. Dean Foods Co., 384 U.S. at 603-05; Application of United States of America For an Order Authorizing an In-Progress Trace of Wire Communications Over Telephone Facilities, 616 F.2d 1122, 1129 (9th Cir. 1980).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

PAUL L. GABBERT

Norma W. Mitchell

NORMA W. MITCHELL
Attorneys for Respondent

Dated: October 25, 1992